United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7262

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P/S

To be argued by
ALVIN M. FEDER

In The

United States Court of Appeals

For The Second Circuit

ROSHAN L. MEHRA, as Administrator of the Goods, Chattels and Credits which were of RAJINDER K. MEHRA,

Plaintiff-Appellant,

- against -

ROBERTA BENTZ and RUDOLPH J. BENTZ, JR.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS
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ROSHAN L. MEHRA, as Administrator of the Goods, Chattels and Credits which were of RAJINDER K. MEHRA

Plaintiff-Appellant

-against-

ROBERTA BENTZ and RUDOLPH J. BENTZ, JR.

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- -X

PLAINTIFF-APPELLANT'S REPLY BRIEF

POINT I

THE COURT'S RELIANCE ON THE CASE OF MARTIN v. MARATECK IS MISPLACED

Appellant's have already presented a United States Supreme Court case, Tenant v. Peoria & Pekin Union R. R., 321 U.S. 29, 35 (1944) declaring:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury as a theory that the proof gives equal support to inconsistent and uncertain inferences ..."

This proposition is at odds with the proposition set

forth in Martin v. Marateck, 345 Pa. 103 (1942), a case relied on heavily by Judge Platt (99a - 101a, 106a), that it is within the province of the Court to take such a case away from the jury:

> "... where it is equally probable the accident may have resulted from either cause, there can be no recovery."

It is not necessary for this Court to select which of the two propositions is proper since the Supreme Court of Pennsylvania in a later case, Smith v. Bell Telephone Co. of Pennsylvania, 397 Pa. 134, 153 A. 2d 477 (1959), specifically "disapproved" the proposition relied on by the Court in the Martin case. The Court in Smith stated:

> "In support of the judgment of nonsuit the court below applied the standard that where plaintiff's case is based on circumstantial evidence and inferences to be drawn therefrom, such evidence must be so conclusive as to exclude any other reasonable inference inconsistent therewith, and that plaintiff did not produce such evidence. Indeed he did not, but did he have to?"

The Court in Smith held that the standard applied by the Court below:

> "...is not a correct statement of the rule to be applied by the judge on deciding a motion for either a nonsuit or binding instructions. If that were the rule what would be the province of the jury? In no case where there was more than one reasonable inference would the jury be permitted to decide. Insofar as this rule is stated in our cases it is disapproved.[1]"

The footnote to the opinion cites as one of the

cases "disapproved", Martin v. Marateck, supra.

Contrary to the proposition relied on in the Martin case, the Court in Smith rejected the "equally probable" theory, holding:

> "It is not necessary, under Pennsylvania law, that every fact or circumstance point unerringly to liability; it is enough that there be sufficient facts for the jury to say reasonably that the preponderance favors liability. The judge cannot say as a matter of law which are facts and which are not unless they are admitted or the evidence is inherently incredible. Also, it is beyond the power of the court to say whether two or more reasonable inferences are 'equal'. True enough the trial judge has to do something like this in deciding a motion for new trial based on the weight of the evidence but no such rule governs him in deciding whether a case is submissible to the jury. The facts are for the jury in any case whether based upon direct or circumstantial evidence where a reasonable conclusion can be arrived at which would place liability on the defendant. It is the duty of plaintiff to produce substantial evidence which, if believed, warrants the verdict he seeks. The right of a litigant to have the jury pass upon the facts is not to be foreclosed just because the judge believes that a reasonable man might properly find either way. A substantial part of the right to trial by jury is taken away when judges withdraw close cases from the jury. Therefore, when a party who has the burden of proof relies upon circumstantial evidence and inferences reasonably deducible therefrom, such evidence, in order to prevail, must be adequate to establish the conclusion sought and must so preponderate in favor of that conclusion as to outweigh in the mind of the fact-finder any other evidence and reasonable inferences therefrom which are inconsistent therewith." [Emphasis added]

It was therefore error for Judge Platt to rely so strongly upon a case which had been specifically "disapproved" by the Pennsylvania Supreme Court and it was error to apply a proposition of law that had been clearly rejected.

In addition to the Pennsylvania law of negligence, appellees switch to a New York case, Wank v. Ambrosino, 307 N.Y. 321 (1954). Wank is distinguishable on the principal ground that there was insufficient proof in that case that the defendant actually struck the pedestrian. The driver testified that he was unaware of having struck the deceased.

In our case there is no difficulty in accepting that (1) the defendant's car hit the deceased, and (2) the collision was the proximate cause of his death.

If in Wank there had been greater proof that the car struck the deceased there would be no problem in finding that plaintiff proved a cause of action in negligence. Judge Conway, writing for the dissent, hypothecated the facts of our case to point out that in such a situation the majority would "clearly" have found that plaintiff established a prima facie case. Judge Conway stated:

> "Had the deceased been tossed aside by the contact in the face of the denial by the driver that he struck him, we would clearly have a prima facie case under our decision in the Scantlebury case, supra, for a man may not drive on a public thoroughfare, strike a pedestrian

and, admitting the contact, pass on his way and be exculpated by his statement that the pedestrian had not been seen."

Moreover, the holding in Wank is based more on the New York substantive law of negligence, and for this reason it is not applicable to our case which must concededly apply the substantive law of Pennsylvania. Therefore appellees cannot pick and choose cases from different jurisdictions which are to their liking while disregarding the substantive law to be applied.

Point I of appellees' brief lists ten other New York cases which are, in greatest part, products liability suits brought by injured plaintiffs. One case, Baillie v. Post, 137 App. Div. 648 (1910) is a suit for attorneys' fees. Not one of these cases concerns itself with the negligence of a motorist, let alone a motorist vis-a-vis a pedestrian.

POINT II

APPELLEES DO NOT REFUTE THAT DEFENDANTS DID NOT SATISFY THEIR BURDEN OF PROOF ESTABLISHING CONTRIBUTORY NEGLIGENCE SO AS TO JUSTIFY TAKING THE ISSUE AWAY FROM THE JURY.

Instead of attempting to demonstrate how defendants satisfied their burden of proof on the issue of contributory

negligence, appellees seek refuge under the case of Auel v. White, 399 Pa. 208, 132 A. 2d, 350 (1959), the second of the two cases relied on by the Court below. The facts upon which the opinion of the divided Court in Auel are based are readily distinguishable from our case. Defendants there presented proof that plaintiff affirmatively failed to exercise care at the time he was crossing the road. No such testimony, whatsoever, was presented regarding the pedestrian's actions on the roadway in our case. Moreover, the pedestrian in Auel could easily have walked to a crosswalk present at either corner, while, in our case, there was no such comparable opportunity.

Far more factually similar to our case is the case of Kriesak v. Crowe, 44 F. Supp. 636 (M.D. Pa. 1942) aff'd 131 F. 2d 1023 (3rd Cir., 1943), discussed in appellant's brief at page 23, which, significantly, has failed to evoke any comment from appellees.

Appellees have also seen fit to abstract conceptual language from Epoch Producing Corp. v. Killiam Shows, Inc., et al., __ F. 2d __, N.Y.L.J. September 4, 1975, page 1. This is a copyright infringement case and is therefore not helpful to an analysis of whether plaintiff introduced proof to raise an issue of fact as to defendants' negligence and

whether defendants satisfied their burden of proof in establishing contributory negligence as to take the issue away from the jury.

POINT III

APPELLEES' OWN ARGUMENTS DEMONSTRATE THAT THE ISSUE OF DEFENDANTS' NEGLIGENCE WAS ONE UPON WHICH DIFFERENT PEOPLE CAN DRAW DIFFERENT CONCLUSIONS.

Appellees argue that the "front of the fender [is] unscathed while the left front side of the fender at a point behind the headlight is dented." (Appellees' brief, page 8). It is quibbling to so delineate the point of the dent on the fender. The photograph of the portion of the fender that is dented, (92a) more so than the lawyers' characterizations of where the dent is, served as a reasonable basis from which a jury could draw the inference that this dent, particularly when added to the shattered windshield, was probative of the fact that the "decedent was within the driver's view".

The fact that appellees have to so carefully pinpoint the dent on the left front fender, taking pains to imply that it is more to the side than it is to the front of the fender, is indicative of how different people can readily come to different conclusions as to whether the driver should or should

not have seen the decedent -- an issue which should properly have remained within the jury's province.

POINT IV

THE RELIANCE BY BOTH JUDGE PLATT AND APPELLEES UPON THE CHARACTERIZATION OF THE HIGHWAY AS A "LIMITED ACCESS HIGHWAY" IS MISPLACED.

Judge Platt's opinion adopts the argument advanced by the defendants that "[Decedent's] mere presence on the limited access highway [is] in violation of 36 P.S. [2391.1]" and constitutes negligence. (105a). The Court refers to the "limited access highway" on three further occasions in its opinion. (106a, 107a)

The first words of the statute, 36 Purdons §2391.1, that defines "limited access highway", relied on by Judge Platt and appellees, are "For the purposes of this act". The purposes of this act are set forth in the Historical Note which follows the statute:

"Title of Act:

> "An Act authorizing the establishment, construction and maintenance of limited access highways and local service highways; and providing for closing certain highways; providing for the taking of private property and for the payment of damages therefor; providing for sharing the costs involved and for the control of traffic thereover; providing penalties, and making an appropriation. 1945, May 29, P. L. 1108"

Thus, characterizing the highway as a "limited access highway" has nothing to do with the respective rights and responsibilities of a motorist and a pedestrian. The definition of such a highway has limited application and is totally unrelated to the standards of care for pedestrians on this or any other roadway.

Furthermore, the statutory language quoted by the Court deals, not with the "presence" of a motor vehicle or pedestrian on such designated highways, but only with their "access" thereto. Therefore, for the Court to have adopted the defendant's contention that such statutory language makes the "mere presence" of the decedent on the highway negligent conduct is erroneous.

Moreover, there is no proof that this highway had been declared a "limited access highway", as required by 36 Purdons, §2391.2, which states:

> "(a) the Secretary of Highways, with the approval of the Governor, is hereby authorized to declare any State highway, route or part thereof, now or hereafter established, to be a limited access highway."

Accordingly, the Court's and appellees' reliance on this statute is misplaced.

CONCLUSION

The Court erred in disturbing the verdict of the jury. The jury's verdict should be reinstated and judgment entered thereon.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROSHAN L. MEHRA, etc.,

Plaintiff-Appellant,

against

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Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

James A. Steele *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 310 W. 146th St., New York, N. Y.

That on the 26th *day of* September *19* 75 *at* 415 Madison Ave, N.Y., N.Y.

deponent served the annexed Reply Brief *upon*

Bower & Gardner

the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* 3 ss herein,

James A. Steele
Print name beneath signature

JAMES A. STEELE

Sworn to before me, this 26th *day of* September *19* 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977